

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ANTHONY RUGGIERO,
Plaintiff,

v.

WESLEY K. CANFIELD, M.D., Medical Director,
Southport Correctional Facility,
BENJAMIN A. OAKES, Physician Assistant,
Southport Correctional Facility, and
JEREMY CLEMENT, Registered Nurse,
Southport Correctional Facility,

Defendants.

DECISION AND ORDER
14-CV-307-A

This case was referred to Magistrate Judge Leslie G. Foschio pursuant to 28 U.S.C. § 636(b)(1) for the conduct of pretrial proceedings. On November 9, 2020, Magistrate Judge Foschio filed a Report and Recommendation (Dkt. No. 113), recommending that Defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56 (Dkt. No. 94) be granted and that Plaintiff's cross motion for summary judgment (Dkt. No. 108) be denied.

On November 23, 2020, Plaintiff filed objections to the Report and Recommendation in so far as it recommended dismissal as against Defendant Wesley K. Canfield, M.D., for untimely substitution pursuant to Fed. R. Civ. P. 25(a) and recommended summary judgment be granted in favor of defendants Canfield, Benjamin A. Oakes, and Jeremy Clement. Dkt. No. 115. Defendants filed a response on December 7, 2020 (Dkt. No. 119), and reply papers were filed on December 22, 2020 (Dkt. No. 121).

Also on November 23, 2020, Plaintiff filed a motion for reconsideration by the Magistrate Judge of his Report and Recommendation in so far as it recommended dismissal as against Defendant Canfield for untimely substitution. Dkt. No. 114. Defendants responded (Dkt. No. 118) and Plaintiff replied. On December 22, 2020, the Magistrate Judge denied the motion for reconsideration. Dkt. No. 122. Plaintiff has not appealed or objected to denial of the motion for reconsideration. The matter was deemed submitted.

Pursuant to 28 U.S.C. §636(b)(1), the Court makes a *de novo* determination of those portions of the Report and Recommendation to which objections have been made. Upon *de novo* review, and for the reasons stated in the Report and Recommendation, the Court adopts the conclusions in the Report and Recommendation with respect to defendants Wesley K. Canfield, M.D., Benjamin A. Oakes, and Jeremy Clement, and it is hereby

ORDERED that the Defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56 (Dkt. No. 94) is granted with respect to defendants Canfield, Oakes and Clement upon the findings and for the reasons stated in the Report and Recommendation. Dkt. No. 113.

The Court notes that after the Magistrate Judge declined to reconsider and change a recommendation to dismiss as against Dr. Canfield for failure to timely substitute after a suggestion of death on the record, Dkt. No. 122, the Second Circuit resolved a split among District Courts in the Circuit by holding that personal service of a suggestion of death under Fed. R. Civ. P. 4 upon a successor or representative of a deceased party is not necessary to trigger the 90-day deadline for a motion to substitute

as provided in Fed. R. Civ. P. 25(a) so long as a suggestion of death is served upon parties. *Kotler v. Jubert*, 986 F.3d 147, 153-56 (2d Cir. 2021). It is further

ORDERED that, because the Court grants summary judgment in favor of Dr. Canfield pursuant to Fed. R. Civ. P. 56, the Plaintiff's objections and unpreserved arguments that his failure to substitute Dr. Canfield sooner should be excused under Fed. R. Civ. P. 6 are all moot. And it is finally

ORDERED that the Clerk shall enter Judgment in favor of all defendants and take the steps necessary to close the case.

SO ORDERED.

s/Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: May 18, 2021